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No. 98-830

In The

Supreme Court of the United States

October Term, 1998

AMOCO PRODUCTION COMPANY, ON BEHALF OF ITSELF AND THE CLASS IT REPRESENTS,

Petitioners,

v.

SOUTHERN UTE INDIAN TRIBE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE*, STATES OF MONTANA, NEW MEXICO, NORTH DAKOTA, UTAH AND WYOMING, IN SUPPORT OF PETITIONERS' REQUEST FOR CERTIORARI

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INTRODUCTION

The States of Montana, New Mexico, North Dakota, Utah and Wyoming (the *Amici* States), by and through their Attorneys General, respectfully submit this brief *amici curiae* in support of the petitioners class's petition for certiorari in *Amoco Production Co. et al. v. Southern Ute Indian Tribe*, No. 98-830. For the reasons discussed below, the impacts caused by *Amoco* are more serious than those that gave rise to similar natural resource cases decided by the Court. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668 (1979) (deciding access rights reserved by the federal government under a railroad grant); *Watt v. Western Nuclear, Inc.*, 462 U.S. 36 (1983) (deciding whether the federal government reserved gravel under the Stock Raising Homestead Act). The harm that the *Amoco* decision will cause to the interests of the *Amici* States merits this Court's careful attention.

INTERESTS OF THE *AMICI* STATES

The decision of the United States Court of Appeals for the Tenth Circuit represents a drastic departure from previously settled law governing ownership of coalbed methane (CBM) gas. If upheld, the Tenth Circuit decision will significantly harm not only the *Amici* States' tax bases and revenues, but entire economies within those States which have developed in reliance on the continuation of the status quo. In addition, as a practical matter, the Tenth Circuit decision would result in such confusion in implementation and chaos in regulation that application of the decision would be nearly impossible. The

result of the confusion, of course, would be many more years of litigation. Because of the profound effect the decision would have upon their sovereign, economic and regulatory interests, the *Amici* States are compelled to ask this Court to grant certiorari to eliminate the confusion created by the Tenth Circuit decision over ownership of CBM gas. The question to be brought before the Court is one of exceptional importance to the *Amici* States and their communities, as well as to state coal and gas regulators and taxing authorities, who have historically relied upon the principle that "gas is gas" and upon the 1981 Solicitor's Opinion for the determination of ownership of such gas.

SUMMARY OF ARGUMENT

The Tenth Circuit Court's decision, in stark contrast to the long-standing practice of both the mineral industry and of the Department of Interior, erroneously interprets CBM gas to be part of the coal reserve. From the *Amici* States' perspectives, this Court should grant review for two reasons. First, the decision is insupportable under any accepted definitions of "coal" or "gas," but, if allowed to stand will drastically impact individuals, communities and entire economies established in reliance on the principle that "gas is gas." Second, because the decision makes no practical sense, implementation of the decision will only lead to confusion and further litigation unless the matter is clarified by this Court. The *Amici* States request that review be granted for the sake of our citizens and communities who will be impacted by the decision, our tax bases in methane gas production which

will be affected by the decision, our public schools whose revenues derived from the school land grants will be impacted by the decision and our state regulatory agencies who will be forced to attempt to interpret and implement the decision.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DISRUPTS YEARS OF INDUSTRY AND DEPARTMENT OF INTERIOR INTERPRETATION OF COALBED METHANE AS GAS, WARRANTING THIS COURT'S REVIEW.

The Tenth Circuit's decision has a direct bearing on the stability of the local economies in each of the *Amici* States. The *Amici* States are mineral rich states, accounting for much of the nation's coal production, as well as oil and gas production. Part of the natural gas production from within the *Amici* States is methane gas, including CBM gas. The *Amici* States' mineral owners and gas producers have relied on the 1981 Department of Interior Solicitor's opinion which concluded that the United States (i) did not reserve coalbed gas when it reserved "coal" under the 1909 and 1910 Acts, (ii) did reserve coalbed gas when it reserved "oil and gas" under the 1914 Act, and (iii) would regulate coalbed gas under gas, not coal, regulatory programs. *See Ownership of And Right to Extract Coalbed Gas in Federal Coal Deposits*, 88 Interior Dec. 538 (1981).[1] Those conclusions were affirmed by the

[1] To address energy supply issues arising from the Arab Oil Embargo, the federal government took steps to encourage

United States District Court for the District of Colorado. *Southern Ute Indian Tribe v. Amoco Production Co. et al.*, 874 F. Supp. 1142 (D. Colo. 1995). The Tenth Circuit Court of Appeals reversed. 151 F.3d 1251 (10th Cir. 1998).

The issues raised by Petitioners are critical to the *Amici* States and their citizens. For instance, within Wyoming's borders alone are 2.68 million acres directly affected by the Tenth Circuit decision, including 2.3 million acres where the federal government granted 1909 and 1910 Act patentees all minerals except coal and 377,000 acres where it granted 1914 Act patentees all minerals except oil and gas.[2] These lands form the core of leading CBM gas areas in Wyoming, such as the Powder River, Green River, Bighorn, and Wind River Basins. To date, the Wyoming Oil and Gas Conservation Commission has issued over 3,000 permits to drill CBM wells. Over 1,200 CBM wells have been completed and an additional 1,500 CBM wells are in the drilling process.

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development of domestic energy sources. It led efforts to convert coalbed gas from what was universally regarded as a hazard to the important natural gas resource it has become. *See, e.g.*, 88 I.D. at 539 (summarizing background and stating that the federal government "must resolve" the issues identified above "in order to expedite development of this energy source.").

[2] These statistics are understated because PUBLIC LAND STATISTICS breaks down grants by state only for patents issued before 1948. *See* PUBLIC LAND STATISTICS 54-55 (1997 ed.). Since 1948 an additional 167,000 acres have been patented under the 1909 and 1910 Acts with a reservation of coal and an additional 2.25 million acres have been patented under the 1914 Act with a reservation of oil and gas. *Id.*

Moreover, coalbed gas activities are projected to accelerate in the future. Nearly all of the CBM well activity in Wyoming is in the Powder River Basin. Gillette, Wyoming is the largest community in the Powder River Basin. Last year, in just one small area south of Gillette, Wyoming, the federal government disclosed the effects of drilling of more than 400 coalbed gas wells. *See* GILLETTE SOUTH COALBED METHANE PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT (Bureau of Land Management, Wyoming State Office, Buffalo Resource Area, 1997). Not all wells will be drilled on affected lands, but due to the "checkerboard" land pattern in the western states, the Tenth Circuit decision could impact any particular well, whether or not it is located on lands patented under the 1909, 1910 or 1914 Acts. *See generally Leo Sheep Co.*, 440 U.S. at 672. In addition to the rapid development of this natural resource, experts project that for environmental and other reasons natural gas consumption – consumption of which coalbed gas is an important part – will increase 40 times faster than all other energy consumption by 2015. *See* 1998 POLICY IMPLICATIONS OF THE GRI BASELINE OF U.S. ENERGY SUPPLY AND DEMAND at 4 (Gas Research Institute).

The recent and projected increase in CBM activities is by no means limited to Wyoming. Indeed, each of the *Amici* States has very similar interests to those of Wyoming which will be significantly impacted if the Tenth Circuit decision is allowed to stand. For instance, last year the Bureau of Land Management prepared an Environmental Impact Statement disclosing the effects of drilling over 600 CBM wells near Price, Utah and the anticipated effects of drilling of an additional thousand

CBM wells in the Uintah Basin. *See* PRICE COALBED METHANE PROJECT FINAL ENVIRONMENTAL IMPACT STATEMENT (Bureau of Land Management, Utah State Office, Moab District, 1997). The *Amici* States believe that this issue is of such great significance that the Tenth Circuit decision should not be allowed to stand without first receiving a careful review by this Court.

The Tenth Circuit's decision significantly affects the *Amici's* citizens and their States. First, the Tenth Circuit decision has a serious social impact on the citizens of the *Amici* States. There are at least hundreds of thousands of successors to 1909 and 1910 Act patentees throughout the states and many of the *Amici* States' school land grants are also subject to the reservations under those Acts. Some of these property owners were fortunate enough to have leases or contracts in place prior to the passage of Public Law 105-367, 112 Stat. 3313 in October of 1998. Most were not that lucky. The unlucky ones now face a real dilemma: either they lease their mineral interests for natural gas, and face the possibility of litigation over whether any gas production is CBM gas, or they do not lease and thereby lose potential royalty payments from non-CBM sources. Since natural gas migrates, if the owners do not lease, their neighbors could deplete their gas reserves. The people impacted are primarily individuals who planned to use royalty proceeds for purposes as diverse as land improvements, college educations, retirements and the like. Unfortunately, those successors to the 1909 and 1910 Act patentees have no certainty under of the Tenth Circuit decision. According to recent correspondence of the Department of the Interior, even oil and gas reservations to the Federal government under the 1914

Act are questionable until further guidance comes out of the *Amoco* litigation. *See* letter from Bob Armstrong, Assistant Secretary, Land and Minerals Management, United States Department of the Interior to Wyoming Governor Jim Geringer, dated October 9, 1998, appendix A. (Appendix to Brief of Amici Curiae States of Montana, New Mexico, North Dakota, Utah and Wyoming in Support of Petitioners' Request for Certiorari, App. 1-4) This Court should hear the case to bring certainty to people's lives and to minimize the social harms that will result from the Tenth Circuit decision.

Second, the consequences of the Tenth Circuit decision – consequences that will retard coalbed gas activities for years – will adversely affect state and local governments. Taxes levied directly on those who engage in mineral activities and those who provide goods and services to those industries contribute greatly to state and local government revenues. The *Amici* States receive severance taxes on CBM gas production, a portion of which is returned to the local governments. Any decline in production resulting from the uncertainty over CBM gas ownership as a result of the Tenth Circuit's decision will result in a loss of revenue to the *Amici* States and their local governments. The disruption of the tax revenues from natural gas production could be quite devastating to local governments within the *Amici* States.

The *Amici* States are also mineral owners of lands with 1909, 1910, and 1914 Acts reservations, including school lands. *See, e.g., State of Utah,* 38 Interior Dec. 245 (1909). As succinctly set forth by this Court in *Andrus v. Utah,* 446 U.S. 500 (1980), Congress granted each of the western public land states designated sections of federal

lands upon the respective states' admission to the Union, for the express purpose of supporting public schools. Title to these numbered sections did not vest in the respective states until completion of an official survey. Prior to the survey, the United States remained free to reserve or otherwise dispose of these lands. In recognition of the fact that portions of the grants might therefore be unavailable to the States due to prior disposition, Congress authorized grants of indemnity or "in lieu" lands of equal acreage. 446 U.S. 506-7. In 1906, President Theodore Roosevelt withdrew by executive order some sixty-six million acres of lands containing "workable coal" from entry under the public land laws. *See Amoco*, 151 F. 3d at 1264. In 1912, Congress acted to permit States to make in lieu selections of known federal coal lands, subject to a reservation of coal to the United States in accordance with the provisions of the 1910 Act. Act of April 30, 1912, 37 Stat. 105, *codified at* 30 U.S.C. § 90 (the "1912 Act").

The decision of the Tenth Circuit thus calls into question the *Amici* States' ownership of coalbed methane underlying all lands granted under the 1912 Act, as well as those acquired under the 1909, 1910 and 1914 Acts. This is not a small problem for the *Amici* States. In Utah, royalties from coalbed methane production are the largest single source of revenue from the State's school lands. If the *Amoco* decision is upheld, Utah could lose ownership of coalbed methane underlying more than 27,000 acres of school lands. The other *Amici* States would be similarly affected. For example, New Mexico could lose more than 10,000 acres and Wyoming more than 13,000 acres. Thus, the *Amici* States may very well be faced with elimination

of gas royalties from lands they own, whether school lands or others. The *Amici* States have consistently taken the position that their natural gas lessees have rights to all gas produced on the States' land, without regard to the initial origin of that gas. The *Amici* States' position has been supported by industry practice and the law that "gas is gas" and should follow the gas estate. The Tenth Circuit's decision will undoubtedly subject the *Amici* States to a plethora of future litigation over ownership of the *Amici* States' natural gas resources and over the royalties and revenues derived therefrom.

To be sure, as a result of the Tenth Circuit decision, the *Amici* States may enjoy 50 percent of the federal royalties derived from leases of CBM gas on lands patented under the 1909 and 1910 Acts. As a matter of principle, however, the *Amici* States believe that the decision reached by the Tenth Circuit is wrong on the merits. Moreover, the social and economic dislocations addressed above outweigh any economic windfall that might otherwise be forthcoming.

II. AS A PRACTICAL MATTER, THE TENTH CIRCUIT'S DECISION RAISES MORE QUESTIONS THAN IT ANSWERS, WARRANTING THIS COURT'S REVIEW.

As with most gases, coalbed methane is a mobile gas. While it originates in coal seams, it demonstrates no hesitance to migrate to adjacent formations. Thus, gas, which originally started as CBM, can be found and developed some distance from the coal seam from which it originated. Evidence in that regard before the District

Court and the Tenth Circuit demonstrated that CBM gas frequently migrates many kilometers and that world renowned gas deposits, such as those in the North Sea, have originated from coal and have migrated to such non-coal formations. While the Tenth Circuit's decision suggests that such gas would have been initially treated as "coal," once it is no longer adsorbed to the solid coal molecules, it appears that the CBM would change from "coal" to "gas" under the court's rationale. Prior to the Tenth Circuit's decision, segregation of natural gases according to their origin was not only impractical, but unnecessary since the natural gas owner's rights extended to all gas produced on his lands, regardless of origin. Now, while such segregation remains impractical, it may be necessary if the Tenth Circuit's decision stands.

To further complicate this matter, the *Amici* States contain a mixed or "checkerboard" land ownership pattern for both surface and subsurface estates. It is common to have adjoining sections of surface or subsurface lands owned by the federal government, the State, a railroad company or its successor in interest, a rancher, or a mineral company. Since the land ownership is so fragmented, any effect on the lands subject to the 1909, 1910, 1912 and 1914 Acts will also affect adjoining undisputed lands. Because of the migration of methane gas, entire natural gas production fields could be affected by the Tenth Circuit decision, even if individual wells are drilled on undisputed land.

The Tenth Circuit's decision is thus impossible to administer. Combining the checkerboard land and mineral ownership pattern in the *Amici* States with the propensity of natural gases, such as CBM, to migrate from

their place of origin will result in unavoidable confusion over ownership of those gases under that court's decision. That confusion will only lead to more litigation over natural gas ownership and entitlement to the royalties generated by its production. The *Amici* States believe that the Court should review the Tenth Circuit's decision to attempt to eliminate that confusion.

CONCLUSION

While the *Amici* States disagree with the Tenth Circuit's analysis and decision on the merits, at this stage of the proceedings, they have only attempted to demonstrate that the *Amoco* decision will create severe impacts on the *Amici* States' revenues, economies and lands and will result in serious confusion in interpretation. These effects of the Tenth Circuit decision merit the grant of certiorari. If that petition is granted, the *Amici* States will file an *amici curiae* brief on the merits.

Respectfully submitted,

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APPENDIX A

[LOGO]

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

OCT - 9 1998

Honorable Jim Geringer
Governor of Wyoming
Cheyenne, Wyoming 82002

Dear Governor Geringer:

Thank you for your letter of August 3, 1998, cosigned by Senator Craig Thomas, Senator Mike Enzi, and Representative Barbara Cubin, to Secretary of the Interior Bruce Babbitt, regarding the recent en banc ruling by the U.S. Court of Appeals for the Tenth Circuit in *Southern Ute Indian Tribe v. Amoco, et al.*, No. 94-1579. Secretary Babbitt has asked me to respond.

The above-mentioned decision affirmed an earlier decision by a three-judge panel of that court which held that coalbed methane (CBM) is part of the coal reservation in lands conveyed by the United States under the 1909 and 1910 Coal Lands Acts. You request that the Department of the Interior "proceed with CBM leases and production based on current practices under the 1981 Solicitor's Opinion" until the ongoing judicial proceedings in the *Southern Ute* case have ended.

The Department of the Interior does not believe that the recent en banc decision in the *Southern Ute* case affects Federal CBM leasing and production on lands in which the United States owns all the minerals, including CBM,

coal, and natural gas. In these situations, the Bureau of Land Management for some time has been leasing CBM under the "gas" provisions of the Mineral Leasing Act of 1920 (MLA). For the following reason, we believe we can continue this practice without running afoul of the Tenth Circuit decision in the *Southern Ute* case. That case concerned who owned CBM and turned on what Congress intended in the 1909 and 1910 statutes regarding coal reservations. In this situation, on the other hand, there is no question about ownership of the CBM, but only a question of whether CBM should be leased under the "coal" or the "gas" provisions of the MLA. Further, whatever Congress may have intended about CBM in the 1909 and 1910 Acts does not control how CBM should be considered in this different context under the 1920 Act. In particular, we believe the Secretary has sufficient discretion under the MLA to decide to lease CBM under either provision. Therefore, at least until there is further guidance on this question, we will continue our current practice of leasing CBM under the gas provisions of the MLA where the United States owns the entire mineral estate.

On lands where the United States owns only the oil and gas estate, and not the coal estate (specifically, on lands patented under the 1914 Act, 30 U.S.C. §§ 121-123, where the United States reserved only the oil and gas estate), the Department also will continue to lease the lands for oil and gas development. Nevertheless, pending further guidance growing out of the *Southern Ute* litigation, the Department will approve applications for permits to drill (APD) only if the APD does not propose to drill a well to a completion target located in a coal formation. This is because, on these lands, the issue is, as in the *Southern*

Ute litigation, who owns the CBM. Here, the precise question is whether it is to be considered a "gas" reserved to the United States, or part of the coal conveyed away from the United States under the 1914 Act. While it is possible that the courts would construe the 1914 Act to reserve CBM as part of the gas estate and would construe the 1909 and 1910 Acts to reserve CBM as part of the coal estate, the matter requires close study. Pending further analysis and possibly further developments in the litigation, we believe the better course is not to approve any APDs for wells drilled to a completion target located in a coal formation on 1914 Act lands. A comparatively small amount of acreage is possibly affected, so the consequences of a limited and temporary moratorium of this nature do not appear large.

Regarding CBM on lands where the United States has reserved coal under the 1909 and 1910 Acts, but not oil and gas, we are not planning to initiate any action at this time with regard to any ongoing CBM activity that may be taking place under private auspices on such lands. The *Southern Ute* litigation is still pending in the courts. Any decisions based on the Tenth Circuit's ruling require deliberation and consultation with the Department of Justice.

The bureau has previously advised its State and Field Offices, in Instruction Memorandum No. 98-28, to:

> . . . take no action which conflicts with the Tenth Circuit Court Decision. While the decision is still under review, we should refrain from taking any affirmative actions to exercise control over coalbed gas in lands in which the United States owns only the coal estate. In that regard,

you may advise private and State oil and gas lessees and their lessors that development in coalbed gas from federally-owned coal is at their own risk. In the event that private or State oil and gas lessees decide to go forward with coalbed gas development from Federal coal in spite of the Tenth Circuit Court decision, you may inform the State agency responsible for approving and supervising oil and gas development on private and State land leases of our operating standards.

If I can be of further assistance, please do not hesitate to contact me. Identical letters have been sent to Senator Thomas, Senator Enzi, and Representative Cubin.

Sincerely,

/s/ Bob Armstrong
Bob Armstrong
Assistant Secretary, Land and
Minerals Management

[Enjoyed being with you at IOGCC]